Supreme Court, U.S.
FILED
APR 24 1991
OFFICE OF THE CLERK

(3)

No. 90-1225

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOE AULSTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

GEORGE W. VAN CLEVE
Deputy Assistant Attorney General

ROBERT L. KLARQUIST
DIRK D. SNEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether oil and gas reservations to the United States in federal land patents pursuant to the Agricultural Entry Act of 1914, 30 U.S.C. 121-125, include deposits of carbon dioxide gas.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Andrus v. *Shell Oil Co.*, 446 U.S. 657 (1980)	11
Aulston v. *United States*, 11 Cl. Ct. 58 (1986), aff'd in part and vacated in part, 823 F.2d 510 (Fed. Cir. 1987)	5
Aulston v. *United States*, 823 F.2d 510 (Fed. Cir. 1987)	5
Brennan v. *Udall*, 251 F. Supp. 12 (D. Colo. 1966), aff'd, 379 F.2d 802 (10th Cir.), cert. denied, 389 U.S. 975 (1967)	13
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	5-6, 9, 15
Ives v. *United States*, No. 80-K-705 (D. Colo. Mar. 25, 1981)	4
Kinney-Coastal Oil Co. v. *Kieffer*, 277 U.S. 488 (1928)	12, 14
McLaren v. *Fleisher*, 256 U.S. 477 (1921)	11
Navajo Tribe of Indians v. *United States*, 364 F.2d 320 (Ct. Cl. 1966)	9
Northern Natural Gas Co. v. *Grounds*, 441 F.2d 704 (10th Cir.), cert. denied, 404 U.S. 951 (1971)	8-9, 13
Sullivan v. *Everhart*, 110 S. Ct. 960 (1990)	5
Sun Exploration & Production Co., 112 I.B.L.A. 373 (1990)	11
Swendig v. *Washington Co.*, 265 U.S. 322 (1924)	10
Udall v. *Tallman*, 380 U.S. 1 (1965)	11
United States v. *Title Ins. Co.*, 265 U.S. 472 (1924)	11

Cases—Continued: Page

United States v. *Washington Co.*, 233 F.2d 811 (9th Cir. 1956) 10
Watt v. *Western Nuclear, Inc.*, 462 U.S. 36 (1983) 10, 14

Statutes:

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 5
Agricultural Entry Act of 1914, ch. 142, 38 Stat. 509, 30 U.S.C. 121-125 2
§ 1, 38 Stat. 509 ..... 2, 9, 11, 12
§ 2, 38 Stat. 509 (30 U.S.C. 122) 3, 8
Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437, 30 U.S.C. 181-287 ..... 3, 8
§ 1, 41 Stat. 437 (30 U.S.C. 181) 3, 4, 12
41 Stat. 437-438 3
41 Stat. 438 7
§ 13, 41 Stat. 441-442 3
Stock-Raising Homestead Act of 1916, ch. 9, 39 Stat. 862, 43 U.S.C. 291 *et seq.* 10, 14
Tucker Act, 28 U.S.C. 1346(a)(2) 4
43 U.S.C. 1745 4

Miscellaneous:

J. Lewis, *Methods of Increasing the Recovery from Oil Sands*, 148 Bureau of Mines Bull. 90 (Dep't of Interior 1917) 9

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1225

JOE AULSTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 915 F.2d 584. The opinion of the district court (Pet. App. 40a-44a) is not yet reported. The opinion of the Interior Board of Land Appeals in *Robert D. Lanier* (Pet. App. 45a-63a), which affirmed the unreported decision of the Bureau of Land Management (Int.-Resp. Br. Opp. App. 1a-24a), is reported at 93 Interior Dec. 66 and 90 I.B.L.A. 293. The opinion of the Interior Board of Land Appeals in *Irving L. Norton* (Pet. App. 64a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1990 (Pet. App. 36a-39a). On December 1, 1990, Justice White extended the time for filing a petition for a writ of certiorari to and includ-

ing January 18, 1991, and on January 9, 1991, further extended the time for filing to and including February 17, 1991. The petition for a writ of certiorari was filed on January 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners own ranchland and farmland in southwestern Colorado. They hold the land under federal patents issued between 1922 and 1962 under the Agricultural Entry Act of 1914, ch. 142, 38 Stat. 509 (codified as amended, 30 U.S.C. 121-125). Each of the patents contained a clause reserving either "oil and gas" or "oil, gas, potash and sodium" to the United States.[1] The reservations in the patents were included pursuant to Section 1 of the 1914 Act, which in relevant part provided:

> [L]ands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported

[1] A typical reservation reads as follows (Pet. App. 7a):

> EXCEPTING AND RESERVING TO THE UNITED STATES all oil and gas in the lands so patented, and to [the United States], or persons authorized by it, the right to prospect for, mine and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the [1914 Act].

> as valuable, together with the right to prospect for, mine, and remove the same.

38 Stat. 509. By 1984, virtually all of the oil and gas reserved in petitioners' patents had been leased by the Secretary of the Interior pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq.*[2] The lessees are intervenor-respondents in the present action. Int.-Resp. Br. Opp. 2.

Petitioners' lands overlie or adjoin a geologic formation known as the McElmo Dome, which was found in 1950 to contain a large amount of carbon dioxide. Carbon dioxide lacked significant commercial value until the 1970s, when, by its high pressure injection into oil wells, it proved useful for tertiary oil recovery. In the wake of this discovery, the leases covering petitioners' lands were, with the Secretary's approval, made part of a unit agreement devoted to the development of carbon dioxide production. Pet. App. 3a, 7a-8a, 47a n.2; see also Int.-Resp. Br. Opp. App. 2a-3a, 18a n.1.

In 1979, the Regional Solicitor of the Department of the Interior determined that the carbon dioxide in the McElmo Dome was "gas" for purposes of the 1914 Act and therefore had been reserved to the United States in petitioners' patents. Pet. App. 8a. That

---

[2] Under Section 2 of the 1914 Act, the oil and gas reservations made in the patents are "subject to disposal by the United States * * * as shall be hereafter expressly directed by law." 38 Stat. 509. The Mineral Leasing Act of 1920 generally provided that "deposits of coal phosphate, sodium, oil, oil shale, or gas * * * owned by the United States * * * shall be subject to disposition" by the Secretary of the Department of the Interior. Ch. 85, 41 Stat. 437-438. The Mineral Leasing Act also specifically authorized the Secretary to issue oil and gas leases. § 13, 41 Stat. 441-442. See also Pet. App. 8a.

determination prompted three judicial proceedings, of which the present case is the third.

In 1980, petitioners filed a class action in the United States District Court for the District of Colorado, challenging the Regional Solicitor's determination and seeking compensation under the Little Tucker Act (28 U.S.C. 1346(a)(2)). Pet. App. 8a. That case, *Ives* v. *United States*, No. 80-K-705 (D. Colo., Mar. 25, 1981), was dismissed when the court determined that petitioners had failed to exhaust their administrative remedies and that their claims exceeded $10,000 and were therefore outside the district court's jurisdiction. Pet. App. 8a-9a.

Thereafter, petitioners applied to the Bureau of Land Management (BLM) in the Department of the Interior for a declaration that the United States claimed no ownership interest in the disputed carbon dioxide. See 43 U.S.C. 1745. The BLM denied that application, concluding that the United States owned the carbon dioxide in the Dome. The BLM based its conclusion in part on its determination that "for at least 40 years" the Department of the Interior has regarded "all [federal] oil and gas leases issued under the [Mineral Leasing Act of 1920] * * * to convey to the lessee the right to develop all substances considered to be gases, with the exception of helium." Int.-Resp. Br. Opp. 8a.[3] The BLM's ruling was affirmed by the Interior Board of Land Appeals (IBLA) in *Robert D. Lanier* (Pet. App. 45a-63a) and *Irving L. Norton* (Pet. App. 64a-65a). Pet. App. 9a.

Petitioners initially sought judicial review of the IBLA's decisions in the Claims Court, where they

---

[3] The Mineral Leasing Act of 1920 expressly excepted helium from those gas deposits that the Secretary was authorized to lease. See 30 U.S.C. 181 (as amended).

also sought compensation for an alleged unconstitutional taking. The Claims Court held that it lacked jurisdiction to decide whether the United States had reserved the carbon dioxide for which compensation was sought. *Aulston* v. *United States*, 11 Cl. Ct. 58 (1986). The United States Court of Appeals for the Federal Circuit affirmed but directed that the case be held in abeyance. *Aulston* v. *United States*, 823 F.2d 510, 514 (1987). By then, petitioners had initiated their third, and present, court action in the United States District Court for the District of Colorado.

2. In the district court, petitioners sought review of the IBLA decisions under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*[4] The district court affirmed those decisions. It agreed with the IBLA that Congress did not express a clear intent in the 1914 Act on the issue whether carbon dioxide is a "gas" reserved to the United States. Pet. App. 42a, 43a. The court held that the IBLA's interpretation of the term "gas" to include carbon dioxide is "based on a permissible construction of the statute." *Id.* at 42a (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

3. The United States Court of Appeals for the Tenth Circuit affirmed. It ruled initially that proper resolution of the case is governed by this Court's decisions setting forth "the analysis a court undertakes when it reviews the validity of an agency's interpretation of a statute the agency is charged with administering." Pet. App. 11a (citing *Chevron U.S.A.*

---

[4] Petitioners also sought a declaratory judgment that "the 'oil and gas' reserved to the United States by the [Agricultural Entry] Act of July 17, 1914 does not extend to carbon dioxide," and that they were entitled to a disclaimer by the United States of its interest in the carbon dioxide. First Amended Compl. para. 110, at 11.

Inc. v. *Natural Resources Defense, Inc., supra*, and *Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990)).

The court first "employ[ed] traditional tools of statutory construction" (Pet. App. 12a) to "conclude that the text of the 1914 Act gives no indication whether Congress intended to prevent carbon dioxide gas from passing to the patentee" (*id.* at 16a). The court observed that in common usage "[t]he operative word 'gas' has numerous meanings" (*id.* at 12a), and that, even within the "legal and technical context of its commercial exploitation * * * the word 'gas' has meanings supporting both sides of this dispute" (*id.* at 13a).[5] The court rejected petitioners' argument that the structure of the 1914 Act evinced an intent to limit the meaning of "gas" to combustible hydrocarbon gas. Petitioner's structural argument—which posited an intent by Congress to reserve only "fuel minerals" and "fertilizer minerals"—raised the question "why Congress did not merely reserve 'fuel gas' " instead of using the unqualified term "gas." Pet. App. 14a.

The court of appeals also determined that "legislative and historical materials surrounding the enactment of the 1914 Act fail to clear up the ambiguity in the word 'gas' as employed in the 1914 Act." Pet. App. 23a. The court recognized that some "snippets of legislative history" relied upon by petitioners suggest that Congress was primarily concerned with reserving "fuel gas." *Id.* at 22a. But that term did not appear in the Act (*id.* at 14a n.7), and, in any event, use of that term by some government officials

---

[5] In support of this observation, the court quoted definitions of "gas" and "natural gas" contained in United States Geological Survey material contemporaneous with the 1914 Act and in industry manuals and secondary legal sources. Pet. App. 13a n.6.

and legislators "reveals no clear [congressional] intent to reserve *only* hydrocarbon gas" (*id.* at 19a). Further, the court noted, other portions of the legislative history weigh against a restrictive reading of the statutory term "gas" (*id.* at 21a). Finally, the court reasoned, petitioners' interpretation is undermined by Congress's use of the term "gas" in the Mineral Leasing Act of 1920, where the term plainly included noncombustible gases like helium. Pet. App. 21a-22a.[6]

"Having concluded that Congress was silent on the question whether carbon dioxide is a 'gas' within the meaning of the 1914 Act," the court of appeals then addressed whether any deference is due to the Interior Department's 1979 interpretation of that term. Pet. App. 23a-29a. The court rejected petitioners' argument that no deference is warranted because the 1979 interpretation is not sufficiently "longstanding and consistent." *Id.* at 23a (quoting petitioners' brief). The court observed that the Department had no reason to adopt an interpretation "[u]ntil the inception of this dispute." *Ibid.* The court, however, rejected the government's contention that great deference is warranted in light of the Department's longstanding definition of the term "gas" to include non-

---

[6] The court determined that the Mineral Leasing Act is relevant because it provided for disposition of the deposits reserved in the 1914 Act (Pet. App. 8a). Moreover, the Mineral Leasing Act "employed the word 'gas' in an enumeration comparable to the 1914 Act, [*i.e.*,] * * * 'coal, phosphate, sodium, oil, oil shale, or gas' " (*id.* at 21a-22a), while reserving to the United States "the right to extract helium from all *gas* produced from lands" leased pursuant to the Act (*id.* at 22a (quoting 41 Stat. 438) (emphasis added by court)). "The emphasized language has meaning," the court reasoned, "only if Congress understood 'gas' to mean the raw gas stream from a well, including both combustible and noncombustible components." *Ibid.*

combustible gases for purposes of the Mineral Leasing Act of 1920 (MLA), ch. 85, 41 Stat. 437 (codified as amended, 30 U.S.C. 181-287). Pet. App. 27a-29a. The court acknowledged that for at least 45 years the Department had consistently defined "gas" in the MLA to include noncombustible gases like carbon dioxide. *Id.* at 28a n.17; see also *id.* at 26a n.15 (citing Interior Department decisions and regulations). The court also recognized that the MLA and the 1914 Act were "substantially contemporaneous and interrelated statutes." *Id.* at 22a, 28a. These considerations, the court determined, warrant "some consideration" (*id.* at 28a) of the Department's definition of "gas" in the MLA. Because that definition and the Department's 1979 interpretation of "gas" in the 1914 Act are consistent, the latter interpretation is entitled to "[s]ome deference * * * under *Chevron*" (*id.* at 29a).

The court held that the Interior Department's interpretation is a permissible construction of the 1914 Act. Pet. App. 29a-35a. The Department's interpretation "certainly does not offend the statute's plain language, which simply refers to 'gas.'" *Id.* at 29a. Nor is the interpretation "inconsistent with the purpose and policy of the 1914 Act." *Id.* at 30a. The interpretation accords with "Congress's general purpose to ensure proper management and disposition of the reserved minerals, including gas, by retaining them in the public domain." *Id.* at 31a. It also fulfills Congress's intent "to put the United States government in a position to convey the same rights a [private] lessor of 'oil and gas' could convey to a lessee to enable the latter to 'prospect for, mine and remove the same.'" *Id.* at 33a (quoting 30 U.S.C. 122). Private lessees, the court noted have consistently been found to be "entitled to the raw natural

gas stream, whatever its chemical makeup." *Ibid.* (citing *Northern Natural Gas Co.* v. *Grounds*, 441 F.2d 704, 715 (10th Cir.), cert. denied, 404 U.S. 951 (1971), and *Navajo Tribe of Indians* v. *United States*, 364 F.2d 320, 326 (Ct. Cl. 1966)).

The court mentioned two other factors supporting its conclusion that Interior's interpretation is rational and consistent with the purpose of the 1914 Act. First, because the interpretation allows lessees to use carbon dioxide to enhance recovery of oil, it furthers the statutory purpose to "conserv[e] the nation's fuel resources." Pet. App. 34a. Second, in their use for oil recovery, "[h]ydrocarbon gas and the carbon dioxide here in question * * * serve parallel functions to some extent, a fact well known during the era of the 1914 Act's enactment." *Ibid.* (citing J. Lewis, *Methods for Increasing the Recovery from Oil Sands*, 148 Bureau of Mines Bull. 90 (Dep't of Interior 1917)). Thus, notwithstanding petitioners' insistence that Congress discerned a significant difference between combustible and noncombustible gas, with respect to "[gas's] utility in oil recovery, its combustibility is irrelevant." *Id.* at 35a.

ARGUMENT

The court of appeals properly applied the analysis set forth in *Chevron*, *supra*, to review the Department of the Interior's interpretation of "gas" in Section 1 of the Agricultural Entry Act of 1914. The court correctly concluded that the Act is ambiguous with respect to the issue presented here—whether "gas" includes carbon dioxide—and that the Department's construction of that term to include carbon dioxide is rational and consistent with the Act. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 7-8, 10-13) that the court of appeals' reliance on *Chevron* violates a rule

against "retroactive deference" (Pet. 13). As petitioners envision it, this rule would compel courts to ignore an agency's interpretation of a statute if the interpretation concerns statutory language that also appears in contracts between the government and individuals executed before the interpretation is adopted. Pet. 11. Petitioners cite no legal authority for such a rule. See *id.* at 7-8, 10-13. In fact, no such rule exists, and this case provides no occasions for fashioning it.

Petitioner's proposed rule clearly does not apply to the authority of courts to construe statutes affecting federal patents. Courts often construe federal statutes authorizing conveyances of property to determine rights under the conveyances. For example, in *Swendig* v. *Washington Co.*, 265 U.S. 322, 332 (1924), the Court held that a government patent was ineffective to transfer property interests that Congress required to be reserved in the underlying statute. The Court construed the patent to include the reservation even though it was not included in the text of the patent. *Ibid.* See also, *e.g.*, *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36 (1983) (construing Stock-Raising Homestead Act of 1916, ch. 9, 39 Stat. 862, 43 U.S.C. 291 *et seq.*, to hold that gravel was included in the "coal and other minerals" reserved in government patents); *United States* v. *Washington Co.*, 233 F.2d 811, 817 (9th Cir. 1956).

Petitioners argue that, in resolving an issue of statutory interpretation affecting federal patents, a court may not consider an agency's interpretation. This argument is premised on petitioners' assertion that, unlike courts, agencies are always "free to reinterpret the statute in other permissible ways at later times" (Pet. 8). That assertion is incorrect and irrelevant here.

Neither courts nor agencies have unlimited discretion to abandon prior interpretations if doing so upsets settled expectations under a federal conveyance. For example, this Court rejected an attempt by the Department of the Interior to reverse its prior interpretation so as to nullify rights previously recognized under a conveyance. See *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 663-673 (1980).[7] The Court has applied similar limitations to judicial decisionmaking. *United States* v. *Title Ins. Co.*, 265 U.S. 472, 486-487 (1924) (courts may not "vacillate and overrule their own decisions on the construction of statutes affecting the title to real property").

No such problem arises in the present case. The Department of the Interior did not issue an interpretation of the term "gas" in Section 1 of the 1914 Act until 1979. As the court of appeals observed, the Department had no reason to do so until then. Pet. App. 23a. The Department was not foreclosed from considering the issue by the passage of time. Nor was the Tenth Circuit barred from according "[s]ome deference" (Pet. App. 29a) to the Department's resolution of this issue. Indeed, the courts have consistently accepted the Department's interpretation of the public land laws if they are "admissible," even if they are "not the only reasonable construction of" them. *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921), quoted with approval in *Udall* v. *Tallman*, 380 U.S. 1, 18 (1965); see also Pet. App. 27a.[8]

---

[7] The Department similarly recognizes limits on its discretion to revise prior interpretations of statutes authorizing federal conveyances. *Sun Exploration & Production Co.*, 112 I.B.L.A. 373, 391-392 (1990).

[8] As discussed, the court of appeals took into account the fact that the Department's interpretation of "gas" in the 1914

Petitioners conceded in the court of appeals that the 1979 interpretation by Interior of "gas" in the 1914 Act did not reverse any prior interpretation of the statute.[9] Accordingly, in this Court petitioners merely speculate (Pet. 12) that the Department may change its interpretation in the future and that such a hypothetical change could upset expectations arising from the 1979 interpretation. *Ibid.* Petitioners' speculation provides no basis for disregarding the Department's current interpretation. Nor does it provide a basis for further review of this case.

2. Petitioners renew their contention (Pet. 14-22) that the 1914 Act "clearly and unambiguously" reserved only "fuel gas" to the United States. The court of appeals correctly rejected that contention.

Here as in the court of appeals, petitioners' primary argument is based on the structure of the 1914 Act. Petitioners claim (Pet. 17) that the substances enumerated in Section 1 of the Act fall into two categories: "fertilizer minerals" and "fuel minerals." The term "gas," their argument goes, is placed between two terms that they believe refer to "fuel minerals." Based on this classification scheme, petitioners conclude that "gas" must also be a "fuel min-

---

Act was not contemporaneous with the statute. The court accorded it "some deference" (Pet. App. 29a), however, because it was consistent with the Department's long-standing interpretation of that term in Section 1 of the MLA. The court's approach was proper in light of the close interrelation between the 1914 Act and the MLA. As this Court has recognized, the 1914 Act and the MLA should "be read together—each as a complement to the other." *Kinney-Coastal Oil Co.* v. *Kieffer*, 277 U.S. 488, 504 (1928).

[9] See Pet. C.A. Br. 35 ("[T]here is no longstanding and consistent agency policy of defining carbon dioxide to be 'gas.'").

eral," and therefore exclude noncombustible gases such as carbon dioxide. Pet. 17-18.

The court of appeals correctly identified the defects in this *ejusdem generis* argument.[10] It requires a compound inference: "[1] that Congress actually considered the combustible and noncombustible components of naturally occurring underground gas and [2] expressed its intent to reserve only combustible gas by its choice of the sequence in which the reserved minerals were listed." Pet. App. 14a. The court of appeals properly wondered "why Congress did not merely reserve 'fuel gas' in lieu of relying on *ejusdem generis*." *Ibid.* The court correctly determined that, while plausible, petitioners' classification theory does not furnish a "clear indication" of congressional intent.[11]

---

[10] Although petitioners omit the term in their petition, in the court of appeals they based the same argument upon "[t]he principle of *ejusdem generis*." Pet. C.A. Br. 16-17.

[11] As the court of appeals observed, "the rule of ejusdem generis has had little application in cases dealing with oil and gas." Pet. App. 16a (internal quotation omitted). This Court has similarly declined to apply the rule in construing federal statutes concerning natural resource allocation. See *Western Nuclear*, 462 U.S. at 44 n.5. See also *Brennan* v. *Udall*, 251 F. Supp. 12, 24-25 (D. Colo. 1966), aff'd, 379 F.2d 862, 806 (10th Cir.), cert. denied, 389 U.S. 975 (1967), in which the court construed a patent reserving "oil" under the 1914 Act to reserve oil shale, a solid rock that is chemically distinct from petroleum oil. Accord *Northern Natural Gas Co.* v. *Grounds*, 441 F.2d 704, 711 (10th Cir.), cert. denied, 404 U.S. 951 (1971). The court of appeals here observed that prior decisions rejecting the argument that the term "oil" in the 1914 Act is a specific term further weighed against reliance on the rule of *ejusdem generis* in interpreting the term "gas," since the rule applies only when a general term follows specific terms. Pet. App. 14a n.8, 15a n.9.

The court of appeals was also correct in concluding that the "snippets of legislative history" relied on by petitioners do not show clear congressional intent to restrict the meaning of "gas" in the 1914 Act. Pet. 16a-23a. Petitioners do not repeat their legislative history arguments here. They merely assert (Pet. 21) that considerations "extrinsic" to the statute do not "overcome the force" of their text-based argument. As explained, petitioners' text-based argument was properly rejected.

In determining whether Congress clearly spoke to the issue here, the court of appeals examined legislation related to the 1914 Act, including the Mineral Leasing Act of 1920. That approach accords with this Court's specific recognition that the 1914 Act and the MLA should "be read together—each as a complement to the other." *Kinney-Coastal Oil Co.* v. *Kieffer*, 277 U.S. 488, 504 (1928). Concomitantly, however, the court here avoided undue reliance on related legislation: "If anything, a comparison of the term 'gas' as used in related statutes favors a generic construction of the term, although we believe it equally likely that Congress had no intent whatsoever concerning carbon dioxide gas." Pet. App. 23a. Thus, the court did *not*, as petitioners contend, conclude that the Mineral Leasing Act "should be read *in pari materia* with the 1914 Act" (Pet. 21).[12] The court's limited reliance on the Mineral Leasing Act

[12] Petitioners do not otherwise dispute the court of appeals' view (Pet. App. 22a) that "substantially contemporaneous and interrelated" statutes such as the Mineral Leasing Act are relevant in interpreting the 1914, nor could they. See, *e.g.*, *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 57-59 (1983) (interpretations of general mining laws are "highly pertinent" to interpretation of Stock-Raising Homestead Act of 1916).

faithfully applied this Court's teaching in *Chevron*, 467 U.S. at 843 n.9, that courts should employ all "traditional tools of statutory construction" to discern whether Congress "had an intention on the precise question at issue."

In addition to mischaracterizing the court of appeals' reliance on the MLA, petitioners renew their contention (Pet. 22) that "gas" leased under the MLA includes noncombustible gas only if the gas occurs as an impurity commingled with combustible gas. On this basis, they argue that, even if Congress intended the meaning of "gas" in the MLA and in the 1914 Act to be the same, the carbon dioxide here would not have been reserved because of its high purity. The court of appeals properly declined to adopt petitioners' interpretation, observing (Pet. App. 34a) that it would implausibly "mak[e] property rights to different chemical components of natural gas dependent on the level of purity (or impurity) of the gas."

3. Finally, petitioners claim (Pet. 15-16) that, even if Congress intended in the 1914 Act to reserve noncombustible gas such as carbon dioxide to the United States, the carbon dioxide in their land could not have been reserved. Petitioners rely on the absence of evidence that the land covered by their patents was "withdrawn, classified, or reported as valuable on account of carbon dioxide" (Pet. 15). This contention, too, is unpersuasive.

Petitioners acknowledge (Pet. 16) their "long-standing concession" that their lands were withdrawn or reported as valuable for "oil and gas." See also C.A. Br. 19. The IBLA found no evidence concerning the type of "gas" on account of which petitioners' lands were withdrawn or reported as valuable. Pet.

App. 53a n.6. The absence of evidence does not, as petitioners would have it (Pet. 15), compel acceptance of their claim that the type of gas was exclusively "fuel gas." Hence, if, as petitioners contend, historical evidence would have been pertinent to determine why petitioners' land was deemed valuable, the absence of such evidence in this record is an additional consideration weighing against further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

GEORGE W. VAN CLEVE
Deputy Assistant Attorney General

ROBERT L. KLARQUIST
DIRK D. SNEL
Attorneys

APRIL 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282081 20506